No. 15771

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARL BEISTLINE,

Appellant,

vs.

CITY OF SAN DIEGO AND
GENERAL DYNAMICS
CORPORATION,

Appellees.

BRIEF OF APPELLEE GENERAL DYNAMICS CORPORATION

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Printed by San Diego Offset Printing Co., 930-8th Ave. - BElmont 2-2126

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I

INTRODUCTION

A. Statement of the Case.

Plaintiff alleges that in 1947 in the City of San Diego, under the color of authority derived from the

State of California, sought to condemn the property described. A complaint for condemnation was filed, and as a result of negotiations the city acquired the property from the plaintiff. It is alleged that this transfer of property resulted from fraud as the city had falsely represented to the plaintiff landowner that the property was to be used for the purposes of a municipal airport. It is further alleged that the plaintiff transferred the property under compulsion since the city had commenced condemnation proceedings. Plaintiff states that this action by the city amounted to a taking of his property without due process of law in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, and that when the defendant General Dynamics Corporation acquired the property from the city it had knowledge of the facts and therefore holds the property subject to whatever rights the plaintiff has against the City. Plaintiff has asked for a return of the property or, in the alternative, that he be awarded a judgment for damages.

Both the defendant City of San Diego and defendant General Dynamics Corporation filed motions to dismiss the complaint on the ground, among others, that the Court lacked jurisdiction since no issue under the constitution or laws of the United States was raised. This motion was granted by the Honorable James M. Carter, Judge of the District Court for the Southern District of California. It is from the order granting this motion that Plaintiff has appealed.

B. Basis of Jurisdiction

This appellee agrees with appellant that the order of the United States District Court for the Southern District of California dismissing the complaint and entered on the 15th day of August, 1957, is an appealable order. However, it is the contention of the defendants in this case that the District Court does not have jurisdiction on the basis of the existence of a federal question or on any other basis to hear the case at bar. It is submitted that the allegation of plaintiff's complaint fail to show jurisdiction in the District Court.

II

WELL PLEADED FACTS RAISING AN ISSUE UNDER THE FOURTEENTH AMENDMENT MUST BE ALLEGED IN PLAINTIFF'S COMPLAINT

Although Official Form 2 (b) of the Federal Rules provides for a general allegation of a constitutional issue, facts raising the issue must follow in the pleading. Without this, a federal court is without jurisdiction on this ground, even though a general allegation of constitutionality is made. 2 Moore 2d Ed., 396 and 1630; Louisville and Nashville R Co. vs. Mottley, 211 U.S. 149, 29 Sup. Ct. 42, 53 L. ed. 126, 127 (1908).

> "As can be seen, the formal allegation of jurisdiction is, as it should be, easy to set forth. It is, however, extremely important to remember that the general allegation of jurisdiction contained in Official Form 2 (b) must be borne out by the clain

"well pleaded, which follows." 2 Moore 2d Ed., 1630.

III

ASSUMING A VIOLATION OF THE CONSTITUTION HAS BEEN ALLEGED BY APPELLANT'S COMPLAINT RESOLVING SUCH AN ISSUE IS ENTIRELY IMMATERIAL TO A CORRECT DECISION OF THE CASE AT BAR

Allegations of the complaint do not raise a substantial federal question and, therefore, this case is not one which "arises under the constitution, laws or treaties of the United States" as required by law. Title 28 U.S.C. Section 1331. Accordingly, the District Court is without jurisdiction to hear this case.

The theories stated by the appellant are based on the purely common law actions of fraud and duress. It is also stated that the city violated an implied condition that the property be used for a public purpose. Obviously, no authority need be cited for the proposition that proof of a violation of the Fourteenth Amendment is not essential for recovery to these actions. Instead it is clear that the question determinative of recovery under each cause is the effect of the city's actions upon the freedom of choice of plaintiff.

The gravamen of both fraud and duress is that the plaintiff did not actually consent to the transaction in question. In the first instance, it is because of misrepresentation of certain of the material facts and in

the second, because force is the sole cause of plaintiff's entering the transaction.

It is stated first that the plaintiff decided to convey the land to the city because of representations that the land would be used for airport purposes when in fact, the city wanted the property for a private investment, and secondly, that the plaintiff sold the property to the city solely because of the threat of a condemnation suit. It is alleged that in doing the above acts, the city violated the Fourteenth Amendment. This is entirely immaterial. Of what possible importance can it be to recovery under the above mentioned common law theories that the city in committing fraud, duress, or violating a condition, incidentally violated the United States Constitution. Why should the Court be required to decide an issue which is unimportant to granting the relief prayed for?

From the above it is clear even without citation of authority that the question of whether there was a violation of the constitution has nothing to do with the case. Thus, there is no Federal jurisdiction.

The law applicable to this case has been well settled ever since the decision of the U.S. Supreme Court in Gully vs. The First National Bank in Meridian, 299 U.S. 109, 57 Sup. Ct. 96, 81 L. ed. 72 (1936). The excellent discussion by Mr. Justice Cardozo of the principles and authorities involved bears quoting at length.

> "How and when a case arises 'under the Constitution or laws of the United States' has

"been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. (Citing cases) The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. (Citing cases) A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto (citing cases), and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. (Citing cases) Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense. (Citing cases).

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"Looking backward we can see that the early cases were less exacting than the recent ones in respect of some of these conditions. If a federal right was pleaded, the question was not always asked whether it was likely to be disputed. (81 L. ed. 72)

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"Viewing the case at hand against this background of established principle, we do not find in it the elements of federal jurisdiction.

"1. The suit is built upon a contract which in point of obligation has its genesis in the law of Mississippi. A covenant for a valuable consideration to pay another's debts is valid and enforceable without reference to federal law. For all that the complaint informs us, the failure to make payment was owing to lack of funds or to a belief that a stranger to the contract had no standing as a suitor or to other objections non-federal in their nature. There is no necessary connection between the enforcement of such a contract according to its terms and the existence of a controversy arising under federal law.

"2. The obligation of the contract being a creation of the state, the question remains whether the plaintiff counts upon a federal right in support of his claim that the contract has been broken. The performance owing by the defendant was payment of the valid debts, and taxes are not valid debts unless lawfully imposed. From this defendant argues that a federal controversy exists, the tax being laid upon a national bank or upon the shareholders therein, and for that reason being void unless permitted by the federal law.

"Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit. The tax here in controversy, if valid as a tax at all, was imposed under the authority of a statute of Mississippi. The federal law did not attempt to impose it or to confer upon the tax collector authority to sue for it. True, the tax, though assessed through the action of the state,

"must be consistent with the federal statute consenting, subject to restrictions, that such assessments may be made. (Citing cases). It must also be consistent with the Constitution of the United States. (Citing cases.) If there were no federal law permitting the taxation of shares in national banks, a suit to recover such a tax would not be one arising under the Constitution of the United States, though the bank would have the aid of the Constitution when it came to its defense. (Citing cases). That there is a federal law permitting such taxation does not change the basis of the suit, which is still the statute of the state, though the federal law is evidence to prove the statute valid.

"The argument for the respondent proceeds on the assumption that because permission at times is preliminary to action the two are to be classed as one. But the assumption will not stand. A suit does not arise under a law renouncing a defense, though the result of the renunciation is an extension of the area of legislative power which will cause the suitor to prevail. Let us suppose an amendment of the Constitution by which the states are left at liberty to levy taxes on the income derived from federal securities, or to lay imposts and duties at their pleasure upon imports and exports. If such an amendment were adopted, a suit to recover taxes or duties imposed by the state law would not be one arising under the Constitution of the United States, though in the absence of the amendment the duty or the tax would fail. We recur to the test announced in Puerto

"Rico vs. Russell & Co. 288 U.S. 476, 77 L. ed. 903, 53 S. Ct. 447, supra: 'The federal nature of the right to be established is decisive -- not the source of the authority to establish it.' Here the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source of state authority. To reach the underlying law we do not travel back so far. By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby. (Citing cases). With no greater reason can it be said to arise thereunder because permitted thereby.

"Another line of reasoning will lead us to the same conclusion. The Mississippi law provides, in harmony with the act of Congress (citing case), that a tax upon the shares of national banks shall be assessed upon the shareholders, though the bank may be liable to pay it as their agent, charging their account with moneys thus expended. (Citing cases). Petitioner will have to prove that the state law has been obeyed before the question will be reached whether anything in its provisions or in administrative conduct under it is inconsistent with the federal rule. If what was done by the taxing officers in levying the tax in suit did not amount in substance under the law of Mississippi to an assessment of the shareholders, but in substance as well as in form was an assessment of the bank alone, the conclusion will be inescapable that there was neither tax nor debt, apart from any barriers that Congress may have built. On the other hand, a finding upon evidence

"that the Mississippi law has been obeyed may compose the controversy altogether, leaving no room for a contention that the federal law has been infringed. The most one can say is that a question of federal law is lurking in the background, just as farther in the background there lurks a question of constitutional law, the question of state power in our federal form of government. A dispute so doubtful and conjectural, so far removed from plain necessity, is unavailing to extinguish the jurisdiction of the states.

"This Court has had occasion to point out how futile is the attempt to define a 'cause of action' without reference to the context. (Citing cases). To define broadly and in the abstract 'a case arising under the Constitution or laws of the United States' has hazards of a kindred of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end. (Citing cases). Instead, there has been a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation, so here in the search for the underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between

"controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by." (81 L. ed. 73-75).

In the later case of Skelly Oil Co. vs. Phillips Petroleum Co., 339 U.S. 667, 70 Sup. Ct. 876, 94 L. ed. 1194 (1949), the Supreme Court discussed the early jurisdictional decisions including the Gully case, supra, and then made the following statement:

"These decisions reflect the current of jurisdictional legislation since the Act of March 3, 1875, 18 Stat 470, ch 137, first entrusted to the lower federal courts wide jurisdiction in cases 'arising under this Constitution, the Laws of the United States and Treaties.' US Const Art 3, sec. 2. The change is in accordance with the general policy of these acts, manifest upon their face, and often recognized by this court, to contract the jurisdiction of the Circuit Courts (which became the District Courts) of the United States.' Tennessee vs. Union & Planters' Bank, supra (152 US at 462, 38 L. ed 514, 14 S. Ct. 654). (citing cases). With exceptions not now relevant Congress has narrowed the opportunities for entrance into the federal courts, and this Court has been more careful than in earlier days in enforcing these jurisdictional limitations. See Gully vs. First Nat. Bank, supra (299 US at 113, 81 L. ed. 72, 57 S. Ct. 96).

To be observant of these restrictions is not

"to indulge in formalism or sterile technicality. It would turn into the federal courts a vast current of litigation indubitably arising under State law, in the sense that the right to be vindicated was State-created, if a suit for a declaration of rights could be brought into the federal courts merely because an anticipated defense derived from federal law. Not only would this unduly swell the volume of litigation in the District Courts but it would also embarrass those courts -- and this Court on potential review -- in that matters of local law may often be involved, and the District Courts may either have to decide doubtful questions of State law or hold cases pending disposition of such State issues by State courts. To sanction suits for declaratory relief as within the jurisdiction of the District Courts merely because, as in this case, artful pleading anticipates a defense based on federal law would contravene the whole trend of jurisdictional legislation by Congress, disregard the effective functioning of the federal judicial system and distort the limited procedural purpose of the Declaratory Judgment Act." (94 L. ed. at 1200-1)

The rule in the Gully case supra has been followed in a great number of later cases. One of these is Rosecrans vs. William Lozier Inc., 142 F. 2d 118, (8th Cir., 1944) wherein one Winder, assignor of Rosecrans entered into an oral contract with Lozier to operate a commissary recreation building, trailer camp and other facilities for use of employees at the Sunflower Ordnance. The employees were working to manufacture munitions for use in the national defense

effort and facilities were to be operated on United State property. The operations were subject to approval and control of the contracting officer of the Corps of United States Engineers. Before entering into the contract with Winder, the defendants had a cost plus a fixed fee contract with the United States for the design and construction of the ordnance plant. The defendants were further to provide fire and police protection to the entire area pursuant to an arrangement with the government. The question came before the Court of Appeals on an appeal from a judgment dismissing the action for want of prosecution after denial of a motion to remand. The case turned on whether the court had erred in denying plaintiff's motion to remand because, in fact, the action did not arise under the constitution or laws of the United States. The court, in holding that there was no substantial federal question involved in the case, rendered the following discussion at page 121 regarding the principles affecting jurisdiction of the federal courts:

> "It is not always easy to determine when a suit may be said to arise under the Constitution or laws of the United States. Some tests, however, seem to be well recognized. To bring a case within the removal statute, a right or immunity created by the Constitution or laws of the United States must be the essential element of plaintiff's cause of action. Gully vs. First National Bank, supra. It is not sufficient to warrant removal that in the progress of the trial it may be necessary to give a construction to the Constitution or laws of the United States, but the case must substantially involve a dispute or controversy

"as to the effect or construction of the Constitution, laws or treaties of the United States, upon the determination of which the result depends. The controversy must be genuine and present as distinguished from a possible or conjectural one. (142 F. 2d p. 121; emphasis supplied)

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"It is the contention of defendants that the United States is immanent throughout this contract, and hence, an action based upon it comes within the purview of the removal statute as one arising under the Constitution or laws of the United States. But no federal law is involved in the making of a contract between two private parties even though the subject matter may be such that the laws of the United States became a part of the contract. That authority to enter into a contract finds its source in some federal law does not necessarily bring a cause of action based upon its breach under federal law. Gully vs. First Natl. Bank, supra; People of Puerto Rico vs. Russell & Co., 288 U.S. 476, 53 S. Ct. 447, 77 L. ed. 903. The federal nature of the right to be established and not the source of the authority to establish it is decisive, and not every question of federal law involved in a suit is proof that a federal law is the basis of the suit, and an action based upon a right which may have its origin in the laws of the United States is not for that reason alone one arising under those laws. The controversy arising under the laws of the United States must be basic in character as distinguished from those that are collateral. They must be disputes that are

"necessary for the determination of the rights of the parties, rather than those that are merely possible, incidental or conjectural.

"It is true that hypothetical cases might be conjured up by one of a creative imagination which would sustain federal jurisdiction in the action between the parties here. For instance, a proper regulation promulgated by an officer of the United States Army having authority might be deemed inapplicable or its interpretation a subject of controversy between the parties. But such an issue would be purely conjectural and to render the cause removable there must be 'a genuine and present controversy, not merely a possible or conjectural one.' Gully vs. First National Bank, supra (299 U.S. 109, 57 S. Ct. 97, 81 L. ed. 70). (142 F. 2d, . 123; emphasis supplied).

Another federal case applying the rule of the Gully case is Teague vs. Brotherhood of Locomotive Firemen and Enginemen, 127 F. 2d 53 (6th Cir., 1942). There a Negro fireman alleged that he was entitled to certain rights as an employee because of his seniority with the Gulf, Mobile, and Northern Railway Company. He stated that these rights had not been accorded to him because of the provisions of a secret agreement entered into between railroad and the union. His complaint to set aside the contract as unlawful had been dismissed on the ground that it did not raise a substantial federal question and, therefore, the court was without jurisdiction. The Court, in affirming the ruling of the lower court, said:

"The present suit concededly is based upon private contracts between the appellant and members of his class on the one hand, and the Railroad on the other. The obligation of the contract being a creation of the state, no Federal right supports the appellant's claim that the contract has been broken, Gully vs. First Nat'l Bank, 299 U.S. 109, 57 S. Ct. 96, 81 L. ed. 70, and insofar as the complaint alleges an invasion of the plaintiff's property right to seniority through a secret, discriminatory and conspiratory agreement between the Railroad and the Brotherood, it sounds in tort, and is to be adjudicated upon the applicable common law of the state. It does not raise a Federal question. The mere fact that one of the alleged conspirators comes into existence through the operation of a Federal law does not bring into question either the validity or the interpretation of the statute. People of Puerto Rico vs. Russell & Co., 288 U.S. 476, 483, 53 S. Ct. 447, 77 L. ed. 903. There it was said: 'The federal nature of the right to be established is decisive -- not the source of the authority to establish it.' Even were this a suit to enforce a right which takes its origin in the laws of the United States, a Federal question would not necessarily be involved for, as was said earlier, 'A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of

"which the result depends.' Shulthis vs. McDougal, 225 U.S. 561, 569, 32 S.Ct. 704, 706, 56 L.ed. 1205." (127 F. 2d p. 55).

The foregoing cases leave no doubt that a federal question is present for jurisdictional purposes only when its decision is essential for granting or denying the relief prayed for. Jurisdiction is present only when an interpretation of the constitution in one manner would grant relief and in another would deny relief. Apparently the rule in the Gully case had its origin in some of the decisions by Chief Justice Marshall. This is shown by the review of certain earlier cases by the court in Smith vs. Kansas City Title and Trust Company, 255 U.S. 180, 41 Sup. Ct. 243, 65 L.ed. 577 (1920):

"At an early date, considering the grant of constitutional power to confer jurisdiction upon the Federal courts, Chief Justice Marshall said: 'a case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either.' Cohen vs. Virginia, 6 Wheat. 264, 379, 5 L.ed. 257, 285; and again, when 'the right or title set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction.' Osborn vs. Bank of United States, 9 Wheat. 738, 822, 6 L. ed. 204, 224. These definitions were quoted and approved in Patton vs. Brady, 184 U.S. 608, 611, 46 L. ed. 713, 715,

> "22 Sup. Ct. Rep. 493, citing Little York Gold-Washing & Water Co. vs. Keyes, 96 U.S. 199, 201, 24 L. ed 656, 658; Tennessee vs. Davis, 100 U.S. 257, 25 L. ed. 648; White vs. Greenhow, 114 U.S. 307, 29 L. ed. 199, 5 Sup. Ct. Rep. 923, 962; New Orleans, M. & T. R. Co. vs. Mississippi, 102 U.S. 135, 139, 26 L. ed. 96, 97." (65 L. ed. at p. 585).

In spite of these earlier decisions, many of the other opinions prior to the decision in the Gully case, supra, were lax in applying the rule. This was noted by Mr. Justice Cardozo as follows:

> "Looking backward we can see that the early cases were less exacting than the recent ones in respect of some of these conditions. If a federal right was pleaded, the question was not always asked whether it was likely to be disputed." (81 L. ed. at p. 72).

This situation was also commented on in the Skelly Oil case, supra:

> "With exceptions not now relevant Congress has narrowed the opportunities for entrance into the federal courts, and this Court has been more careful than in earlier days in enforcing these jurisdictional limitations. (94 L. ed. at p. 1200; emphasis supplied).

The cases cited by the appellant in "Point (D)" of his brief were all decided before the Gully decision. Therefore, the rules stated in those cases insofar as

inconsistent with the edict of the Gully and other cases are of course overruled, and cannot be considered as contrary authority. Furthermore, all of the decisions cited by the appellant involved applications for injunctive relief wherein the plaintiff was seeding to prevent a constitutional violation; here it is contended that the violation has already occurred. None of those cases were cited by the court in the Gully case, supra, nor contained in the material from the attorneys' briefs summarized in the reports; therefore it can only be concluded that the Supreme Court did not consider them to state applicable principles. Accordingly, no further comment on these cases is warranted.

IV

APPELLANT'S COMPLAINT FAILS AS A MATTER OF LAW TO ALLEGE A VIOLATION OF THE CONSTITUTION

No possible federal question can be presented for decision by plaintiff's complaint since it fails as a matter of law to allege a violation of the constitution. In the previous section of this brief, it was assumed for the sake of argument that a violation of the constitution had been alleged; but it was there pointed out how under the Gully case, supra, such a question, though alleged, was entirely immaterial to deciding the case. It is equally clear from the hereinafter cited authorities that the alleged conduct by the City of San Diego does not constitute a violation of the Fourteenth Amendment.

It is apparent from reading appellant's brief that his contention as to the existence of a constitutional violation is grounded solely on the theory that there was an unlawful taking pursuant to the power of eminent domain. This statement is contained in appellant's brief.

> "In any event the central theme of each Count is that the property of plaintiff was taken not for a public use, but for a private use."

It is equally apparent that any conduct which falls short of constituting an exercise of the power of eminent domain does not violate the constitution but at most will give rise to a civil remedy. Therefore, the question here is whether there was a "taking" of appellant's property.

Under the authorities cited in section I of this brief, this taking or exercise of power must appear in the complaint from well pleaded facts. The appellant merely alleges that negotiations took place between himself and city officials as to the sale of his property, and that a complaint for condemnation was subsequently filed in Superior Court. No other facts are alleged. It is well settled, both in California and elsewhere, that the foregoing acts by city officials do not amount to a taking of property. Eckhoff vs. Forest Preservation District, 36 N. E. 2d 245, 248, 377 Ill. 208 (1941); 23 Tracts of Land vs. U. S., 177 F. 2d 967 969-970 (6th Cir., 1949); Hempstead Warehouse Corp. vs. U. S., 98 F. Supp. 572 (Ct. of Cls., 1951); 35 C. J. S. 930).

In the Eckhoff case, supra, the issue before the Supreme Court of Illinois was whether a question of the construction of certain Constitutional provisions, including the Fourteenth Amendment to the United States Constitution, was before the Court. The question was raised by a motion to strike the pleading. The Court said:

> "It seems obvious that the taking or damaging of land by eminent domain is not accomplished by passing resolutions or ordinances, nor by negotiating with the owner for the purchase of it, or serving notices upon him that the land may be required for public purpose. The series of corporate actions by the appellee district, complained of, cannot be said to have had the same effect upon their land as the filing of a condemnation petition. Such could not, in any sense, be held to be the taking of land or damaging of land not taken. The fact that at some future time a municipal corporation, with power of eminent domain, may require the land of a private owner, is one of the conditions on which the owner holds land in this State. Entering into negotiations for the purchase, and filing of a petition to condemn, vests no interest in land. (citing cases). (Emphasis supplied).

In 23 Tracts of Land, supra, the Sixth Circuit Court of Appeals made this statement:

> "The claim for compensation to which a landowner is entitled for the taking of his property by governmental authority arises at the time of taking.

"The enactment of legislation which authorizes condemnation of property is not such a taking even though it may cause a change in the value of the property. Such legislation may be repealed or appropriations may fail. The filing of a petition in condemnation without taking possession is not a taking. The condemnor may discontinue or abandon his effort. Changes in value from such events are incidents of ownership rather than a 'taking' in the constitutional sense. Danforth vs. United States, 308 U.S. 271, 283-286; 60 S. Ct. 231, 84 L. ed. 240." (Emphasis supplied).

In the Hempstead Warehouse case, supra, it is admitted by the plaintiff that the threat to condemn one's property does not constitute a taking of the property.

"Plaintiff admits that the threat to condemn one's property does not constitute a taking, as well it must; ....."

The rule has been stated that even though proceedings are commenced and possession of land is taken, the taking is not complete.

".....even though the condemnor may take possession of the property before the proceedings are finally determined, and thereafter abandon the proceedings and relinquish the possession of the property, there is no denial of due process of law." (Vol. 16A C.J.S. 930).

Under California law where an order of immediate possession is made before trial, a "taking" does not occur until the date of possession by the condemning authority. Metropolitan Water District vs. Adams, 107 P. 2d 618, 16 Cal. 2d 676 (1940); City of San Rafael vs. Wood, 301 P. 2d 421, 144 C.A. 604 (1956); People vs. Peninsula Title Guar. Co., 301 P. 2d 1, 47 Cal. 2d 29 (1956); 17 Cal. Jur. 2d 637, Em. Dom. Section 63. These authorities indicate that a taking does not even occur upon the obtaining an order of immediate possession; instead the state instrumentality must have obtained actual possession. It is only then, according to these California authorities, that the power of eminent domain has been exercised and that therefore the landowner is entitled to compensation.

Certainly the above authorities reflect a fortiori that negotiations together with filing of the complaint in condemnation do not amount to a taking of the property under the power of eminent domain. Without an actual exercise of this power for a private purpose there can be no constitutional violation. This is because all acts falling short of a "taking" will at most give rise to the common pleaded law theories of recovery. It is clear, therefore, that no violation of the Fourteenth Amendment has been alleged.

> "pretends to represent a party, and connives at his defeat, or, being regularly employed, corruptly sells out his client's interest." Pico vs. Cohn (1891) 91 Cal. 129, 133-4, (25 P. 970, 27 P. 537, 25 Am. St. Rep. 159, 13 L.R.A. 337).) (128 C. A. 2d at pages 549-50).

The case is also significant since it was not even contended that the conduct of the school district had violated the due process clause of Federal or State Constitutions.

VI

CONCLUSION

From the foregoing argument and citation of authority, it must be concluded that the District Court has no jurisdiction to hear this case. The complaint does not allege facts constituting a violation of the Fourteenth Amendment. Even if it be assumed that such a violation is alleged, decision of such a question is entirely unnecessary to granting the relief prayed for.